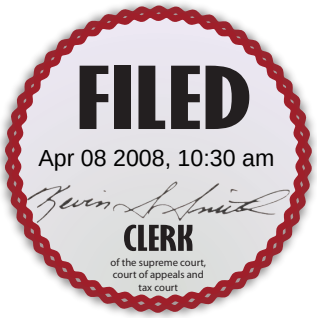

ATTORNEY FOR APPELLANT:

DAVID ROSSELOT
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRIAN K. MORGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0711-CR-629
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0608-FB-197

April 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Brian K. Morgan appeals his conviction, after a guilty plea, of one count of sexual misconduct with a minor, as a class C felony, and the sentence imposed.

We affirm.

ISSUES

1. Whether Morgan's conviction must be reversed because he did not knowingly and voluntarily plead guilty.

2. Whether the trial court imposed an excessive sentence.

FACTS

On June 9, 2006, forty-one year-old Morgan was staying in a campground where he had been fishing with fourteen-year-old A.C.'s father. That evening, A.C. was watching a movie in Morgan's camper and fell asleep on the couch. Morgan's sons, friends of A.C., were asleep elsewhere in the camper. At approximately 6:00 the next morning, A.C. awoke to find her pants pulled down and Morgan with his head between her legs – licking her vagina, and then saw him unzip his pants and begin to pull them down. She experienced discomfort and pain. Morgan begged her not to tell anyone.

On August 24, 2006, the State filed an information charging Morgan with one count of sexual misconduct with a minor, as a class B felony. Specifically, the information alleged that on June 10, 2006, Morgan "did perform or submit to sexual intercourse or deviate sexual conduct" with A.C. (App. 8). Subsequently, on January 29,

2007, the State filed a second count: sexual misconduct with a minor, as a class C felony.[1] This information also alleged that on June 10, 2006, Morgan "did perform or submit to sexual intercourse or deviate sexual conduct with" A.C. (App. 8).

The next day, January 30, 2007, counsel for Morgan filed a request for the trial court to schedule a plea hearing. At the hearing, on June 13, 2007, Morgan's counsel informed the trial court that Morgan would plead guilty to the second count, sexual misconduct with a minor, as a class C felony, "with an open sentence." (Tr. 2). Morgan affirmed that as being correct. Morgan affirmed that he understood the possible sentence to be eight years in prison, and that by pleading guilty he would "be admitting [he] committed this crime and [would] be sentenced without trial." (Tr. 3). Morgan affirmed that he had "been over the rights with [his] lawyer that he [would] waive if [he] plead[ed] guilty." *Id.* The trial court offered "to go over those again with [him]" if he wished, and Morgan responded, "I understand." *Id.* Morgan and the State "stipulate[d] to" the attachment to the probable cause affidavit, which the trial court found to "establish a prima facie case" for sexual misconduct with a minor, as a class C felony.[2] *Id.* It accepted Morgan's guilty plea and entered judgment of conviction.

On September 10, 2007, the trial court held the sentencing hearing. Morgan confirmed that he had reviewed the pre-sentence investigation report and that it was

---

[1] "A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct" commits sexual misconduct with a minor, a Class C felony. However, the offense is a Class B felony if it is committed by a person at least twenty-one (21) years of age." Ind. Code § 35-42-4-9.

[2] The facts recited above are those found in the attachment to the probable cause affidavit.

accurate. The trial court offered Morgan the opportunity to take the stand and testify, or to make a statement. Morgan did neither. The trial court stated that it had "re-read all of the affidavits that were filed, and . . . studied the pre-sentence report." (Tr. 12). It then stated that "considering the fact that [Morgan] ha[d] . . . five prior felonies," it was ordering Morgan to serve a sentence of eight years.

DECISION

1. Guilty Plea

Morgan appears to argue that the trial court erred in accepting his guilty plea as having been a knowing and voluntary waiver of his *Boykin*[3] rights in compliance with the statute,[4] when he simply (1) affirmed to the trial court that his attorney had explained the rights he would waive by pleading guilty, and (2) declined any further elaboration thereof by the trial court. This is not an argument that can be made on direct appeal.

As our Supreme Court explained in *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996), "[o]ne consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal." Therefore, the defendant may not challenge the trial court's acceptance of his guilty plea on direct appeal. *Id.* at 394. What *Tumulty* characterized as the "longstanding judicial precedent" in this regard, *id.* at 396, was again applied by our Supreme Court in *Jones v. State*, 675 N.E.2d 1084 (Ind. 1996). Jones made a claim on direct appeal that his "guilty plea was invalid because it was not knowing or voluntary." *Id.* at 1089. Citing *Tumulty*, the court held that he could not assert a challenge to "the

[3] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[4] *See* Ind. Code § 35-35-1-2.

validity of a guilty plea . . . on direct appeal." *Id.* Again citing *Tumulty*, Jones held that the "avenue for claims addressing the validity of guilty pleas" was found in Indiana Post-Conviction Rule 1, and that post-conviction relief was "the vehicle for pursuing" such a claim. *Id.* at 1090. Accordingly, Morgan's first argument must fail.

2. Sentence

Morgan claims that his eight-year sentence, the maximum sentence for a class C felony offense,[5] is excessive. His first argument is that although the trial court found one valid aggravating factor, his criminal history, it erroneously failed to consider as mitigators his guilty plea and the hardship that his incarceration will impose upon his four children. We cannot agree.

"Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). Nevertheless, the trial court must enter a sentencing statement – one which explains its reason for imposing a particular sentence. *Id.* "One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all." *Id.* Although the sentencing statement here is minimal, we cannot say that it is so lacking as to constitute an abuse of discretion. Another way in which there may be an abuse of discretion is when the trial court's sentencing statement explains its reason for imposing the sentence, "but the record does not support" that reason. *Id.* Here, Morgan does not challenge the finding that he had been convicted of five previous felony offenses.

[5] *See* Ind. Code § 35-50-2-6.

However, there is no abuse of discretion in not finding a mitigating factor unless it is "clearly supported by the record and advanced for consideration." *Id.* at 491.

> On rehearing, our Supreme Court
>
> > clarif[ied] that a defendant who pleads guilty does not forfeit the opportunity to claim on appeal that the trial court should have considered his guilty plea a mitigating circumstance even though the defendant failed to assert this claim at sentencing.

Anglemyer v. State, 875 N.E.2d 218, 219 (Ind. 2007). It quoted its previous holding "that a defendant who pleads guilty deserves 'some' mitigating weight to be given to the plea in return." *Id.* (quoting *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, it also noted that "the significance of a guilty plea as a mitigating factor vari[ed] from case to case," and cited as an example that the plea might "not be significantly mitigating . . . when the defendant receives a substantial benefits in return for the plea." *Id.* at 221. Here, before his plea, Morgan was exposed to a potential maximum sentence of twenty years on the class B felony offense with which he was charged. Instead of facing this possible sentence, Morgan pleaded guilty to the class C offense, for which the maximum sentence was the eight years imposed. Such a lesser sentence "was a substantial benefit." *Id.* Therefore, as did *Anglemyer*, we find no abuse of discretion in the trial court's omission of any reference to Morgan's guilty plea. *Id.*

As to Morgan's claim that the trial court erred when it failed to find as a mitigator that his incarceration would pose a hardship on his children, the record does not reflect that he argued this matter to the trial court. Further, according to the pre-sentence investigation report, none of his children were living with him, and he provided no court-

ordered support for them. Therefore, we do not find any abuse of discretion in the fact that the trial court did not find this to be a mitigating factor.

Finally, Morgan argues that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). Citing *Jordan v. State*, 787 N.E.2d 993 (Ind. Ct. App. 2003), he asserts that analysis under this Rule should consider that his previous felony convictions did not involve any sexual misconduct by him.

We have the authority to revise a sentence if, "after due consideration of the trial court's decision," it is found that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate rule 7(B). The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In *Jordan*, we noted that the "significance" of a criminal history aggravator "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." 787 N.E.2d at 996. "Therefore, a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense." *Id.* It appears that all of Morgan's criminal history involves the element of substance abuse – both alcohol and drugs. As a consequence of previous offenses, Morgan had twice been in court-ordered substance abuse programs. Yet according to the record, Morgan told both A.C.'s mother and the probation officer that his criminal act occurred when he was intoxicated. We cannot agree that there is no relationship between Morgan's criminal history and the offense he committed here.

The nature of the offense is that forty-one year-old Morgan found his sons' fourteen-year-old friend A.C. asleep and then pulled down her pants, placed his head between her legs, and proceeded to lick her vagina. Morgan did this after drinking alcohol to the point of intoxication. Morgan had an extensive history of substance-abuse related felony convictions. We do not find the eight-year sentence inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.